AMBANK (M) BHD

v.

JAYABHALAN RAMACHANDRAN

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: 22NCC-1709-10-2011]
28 SEPTEMBER 2012

BANKING: *Banks and banking business - Loan facility - Loan secured by Deed of Assignment - Failure to realise security in timely manner - Whether abuse of process*

LIMITATION: *Accrual of cause of action - Fresh accrual of cause of action - Loan secured by Deed of Assignment - Failure by bank to realise security in timely manner - Whether action of recovery of loan barred by limitation - Whether deeming clause in agreement triggered cause of action upon default - Limitation Act 1953, s. 21(1)*

Pursuant to a Loan Agreement dated 16 December 1996 the plaintiff through its predecessor in title, MBf Finance Bhd, granted a loan of RM282,600 to the defendant for the purchase of an office lot priced at RM471,070. As a security for the loan the defendant assigned all his rights, title and interest in the office lot to MBf Finance Bhd *via* a Deed of Assignment dated the same. However the defendant did not proceed with the purchase of the office lot and did not make any instalments to the plaintiff since January 1998. The plaintiff filed its first suit to recover the loan in 2004 but it was struck off by the court for non attendance of parties. The office lot was finally put up for auction on 10 February 2009 and was successfully auctioned off on 28 December 2009 at the reserved price of RM184,000. The proceeds from the auction was insufficient to pay the amount outstanding which had accumulated with interest through the years. The plaintiff filed a second suit on 17 October 2011 claiming the sum of RM1,123,473.47 as at 14 July 2011 together with interest at the rate of 10.50% per annum (including 1.00% per annum being the default interest) calculated from 15 July 2011 to date of realisation. The issues that arose, *inter alia* were: (i) the interpretation of clauses in the loan agreement to determine when the cause of action arose and whether it was caught by limitation; (ii) whether the realisation of a shortfall after an auction gave rise to a fresh cause of action; (iii) whether the bank owed a duty to

A the borrower for a timely realisation of the property assigned to reduce the borrower's indebtedness; and (iv) whether the plaintiff's second suit was an abuse of process.

Held (dismissing plaintiff's claim with costs):

B **(1)** Upon the failure to pay an instalment which was due, s. 11.02 of the Loan Agreement (LA) was activated. In light of the deeming provision of s. 11.02 and the admission by PW1 that numerous letters to remedy the default had been sent, the cause of action would have been triggered. Thus a formal C recall of the loan was not necessary to found a cause of action. The plaintiff bank could not backtrack and beg for indulgence when a cause of action had earlier and easily accrued because of the use of automatic activated deeming clause and a deeming debt due clause in s. 11.01 and D s. 11.02. Therefore, based on the limitation period of 12 years under s. 21(1) of the Limitation Act 1953, the second suit filed on 17 October 2011 was time barred. (paras 16, 17, 20 & 22)

E **(2)** The right of realisation of the property did not vest in the plaintiff a new, separate and an independent cause of action. Hence cl. 11.04 did not create a new debt. The defendant continued to be liable for any shortfall which might accrue post realisation of the said property. (paras 34 & 35)

F **(3)** The bank owed a duty of care to dispose of the security put up for a loan at the best possible price as highlighted in *Cuckmere Brick Co Ltd and Another v. Mutual Finance Ltd*. Had the property been auctioned soon after the default, the price G could have been better and the defendant would not have been confronted with a debt of over RM1.1 million. The undue and inordinate delay on the part of the bank to realise the security by way of an auction sale, the commencement the second suit 12 years after the default and the act of allowing H the debt to balloon to more than RM1.1 million - all these made the second suit an abuse of process. (paras 44, 47 & 48)

Case(s) referred to:

I *Bradford & Bingley Building Society v. Seddon [1999] 1 WLR 1482* ***(refd)***

Chan Boi Loi v. Public Bank Bhd & Another Application [2009] 6 CLJ 81 FC ***(refd)***

Cuckmere Brick Co Ltd and Another v. Mutual Finance Ltd [1971] 1 Ch 949 ***(foll)***

Goh Nellie v. Goh Lian Teck and others [2007] 1 SLR (R) 453 ***(refd)***
Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah [1991] 1 CLJ 821; [1991] 2 CLJ (Rep) 732 HC ***(not foll)***
Hunter v. Chief Constable of the West Midlands Police [1982] AC 529 ***(refd)***
In Re McHenry McDermott v. Boyd [1894] 8 Ch 290 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
Malayan Banking Berhad v. Wembley Industries Holdings Bhd [2012] 5 CLJ 956 HC ***(refd)***
MBf Finance Bhd v. Muruges Kuppusamy [2012] 9 CLJ 1045 HC ***(refd)***
McHugh v. Union Bank of Canada [1913] AC 299 ***(refd)***
RHB Investment Bank Bhd & 5 Ors v. Plaza Rakyat Sdn Bhd & Anor [2012] 5 AMR 363 ***(refd)***
Setiadi Hendrawan v. OCBC Securities Pte Ltd and others [2001] 3 SLR (R) 296 ***(refd)***
Standard Chartered Bank Ltd v. Walker and another [1982] 1 WLR 1410 ***(refd)***
Tan Kong Min v. Malaysia National Insurance Sdn Bhd [2005] 3 CLJ 825 FC ***(refd)***
Wong Sin Fan & Ors v. Ng Peak Yam & Anor [2011] 9 CLJ 873 CA ***(refd)***
WTK Holdings Bhd v. Foo Sae Heng & Anor [2011] 5 CLJ 433 CA ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 106, 114(g)
Limitation Act 1953, ss. 6, 21(1)

For the plaintiff - Megat Abd Munir (Roger Leong Chun Lim with him); M/s Zain Megat & Murad
For the defendant: M R Kumar; M/s Kumar Assocs

[Editors' Note: Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah [1991] 1 CLJ 821; [1991] 2 CLJ (Rep) 732 HC was overruled in Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC]

Reported by Sandra Malani Gabriel

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] This case raises the interesting question as to when a bank's cause of action to recover the principal and interests arises. Much would depend on how the default event is worded. The borrower contended that as he had failed to service the loan from the commencement of the instalments, the cause of action would arise

from the moment the bank gives a letter to remind for payment and to remedy the breach. The banker argued that the cause of action arises only after a formal demand is made to recall the full principal amount of loan and interest accrued. A further interesting question is whether the determination of a shortfall after the auction of the security gives rise to a fresh cause of action.

Parties

[2] The plaintiff through its predecessor-in-title MBf Finance Bhd granted a loan to the defendant. It was for the purchase of an office lot in an office complex known as Ue3 Corporate Suites. The land on which the office complex was built is in the name of Miharja Development Sdn Bhd. The Developer is Uncang Emas Sdn Bhd. Both Miharja Development Sdn Bhd as owner of the land and the developer had given a power of attorney to MBf Property Services Sdn Bhd as Project Manager of the project.

[3] The defendant is a borrower of MBf Finance Bhd. He took a loan of RM282,600 under a loan agreement dated 16 December 1996. There was also a Deed of Assignment of the same date entered into between the defendant and MBf Finance Bhd. Under the assignment the defendant assigned all his rights, title and interests in the office lot to MBf Finance Bhd as security for the loan.

Problem

[4] The purchase price of the office lot was RM471,070. It was about 1,308 square feet. He was told by a sales agent that he only needed to pay RM10,000 as an initial down payment for the purchase to the developer. The balance would be financed by MBf Finance Bhd as the development is part of the MBf Group. He was brought by the sales agent to the office of MBf Finance Bhd at Plaza MBf in Jalan Ampang. There he was given the assurance by a credit officer of MBf Finance Bhd that the developer would give a letter to MBf Finance Bhd that he had paid the difference between the purchase price and the loan sum. According to him in his pleading and in his witness statement, when he asked how this could be possible, he was told that the developer and MBf Finance Bhd are members of the MBf Group of companies and that such a letter of confirmation was not an issue.

[5] He gave evidence (Q&A5 in DWS1) that on or about 15 December 1996, he received a letter dated 13 December 1996 sent by MBf Property Services Sdn Bhd to the solicitors for MBf Finance Bhd confirming that he had paid the difference between the purchase price and the loan sum of RM188,470 to the developer for the said office lot. The said letter is exhibited at p. 183 of bundle F (common bundle of document Part B). It was carbon-copied to the defendant and MBf Finance Bhd. The plaintiff denied this and in reply thereto stated that any payments made to third parties is not relevant and not binding on the plaintiff. The plaintiff emphasised that what it is claiming is the loan sum that the defendant had defaulted in payment.

[6] In 1997 the defendant decided not to proceed with the purchase of the office lot and he did not take vacant possession of it when requested to do so by MBf Property Services Sdn Bhd by their letter of 22 December 1997. The defendant had not made any instalment payments to the plaintiff under the loan agreement which instalment had commenced in January 1998.

[7] The plaintiff as expected took legal action. It filed its first suit in 2004 in Kuala Lumpur High Court (Civil Division) in S4-22-248-2004 ("first suit") against the defendant claiming for the sum of RM563,569.37 as at 1 September 2003 for default of the loan agreement. The first suit was struck out by the court for non-attendance of both parties. The plaintiff's application to reinstate the first suit was rejected on 10 January 2011. The plaintiff then appealed against the High Court decision to the Court of Appeal but on 19 May 2011 withdrew the said appeal.

[8] Though there had been default since 1998, the office lot was only put up for auction on 10 February 2009, after a lapse of some 11 years. The office lot was successfully auctioned off on 28 December 2009 at the reserved price of RM184,000. This was of course hardly enough to pay the amount outstanding which had accumulated with accrued interest through the years.

Prayer

[9] In this second suit filed on 17 October 2011 the plaintiff sued for the sum of RM1,123,473.47 as at 14 July 2011 together with interest at the rate of 10.50% per annum (including 1.00% per annum being default interest) calculated from 15 July 2011 to date of realisation! The defendant in his defence complained that this had unnecessarily increased the amount outstanding to the plaintiff with the penalty default interest.

[10] The defendant raised the following defences:

(i) That the plaintiff's claim is barred by limitation under s. 6 or s. 21 of the Limitation Act 1953 as the cause of action had arisen in 1998;

(ii) That the plaintiff's claim is an abuse of process; and

(iii) That the plaintiff owed a duty of care to the defendant to auction the office lot timeously and reduce the loan and that the plaintiff's unexplained and unreasonable delay in so auctioning had caused the defendant to bear unnecessary interest.

Preliminaries

[11] The material facts in this case are not in dispute. The plaintiff bank called a representative to testify on its behalf on what was mainly documentary evidence of the loan transaction and the terms of the loan and the defendant had only himself as a witness. At the end of the day the issues turned on the interpretation to be given to various clauses of the loan agreement with respect to when the cause of action has arisen and whether the plaintiff's claim is caught by limitation. The other issues of whether the plaintiff's second suit is an abuse of process and whether the bank owes a duty to the borrower in a timeous realisation of the property assigned to it so as to reduce the borrower's indebtedness are of course interesting legal issues to explore. The following were marked and set out below for ease of reference:

(a) Bundle of Pleadings ("bundle A");

(b) Issues to be tried ("bundle B");

(c) Agreed Facts ("bundle C");

(d) Plaintiff's Summary of Case dated 5 April 2012 ("bundle D");

(e) Defendant's Summary of Case ("bundle E");

(f) Common Bundle of Documents ("bundle F");

(g) Plaintiff's Supplementary Bundle of Documents ("bundle G");

(h) Defendant's Supplementary Bundle of Documents ("bundle H");

(i) Plaintiff's Witness Statement of Azli bin Atan ("PWS1"); and

(j) Defendant's Witness Statement of Jayabhalan a/l Ramachandran ("DWS1").

Principles

When Does The Plaintiff's Cause Of Action Arise Under The Facility Agreement?

[12] From the evidence adduced it is not in dispute that the defendant had failed to effect any payment whatsoever to the plaintiff under the loan agreement from day one. The first instalment was due on end of January 1998 or February 1998. PW1 who was an officer of MBf Finance Bhd then and now an officer of the plaintiff under cross-examination admitted to the following:

(i) It is a common practice of the plaintiff to issue letters of reminders if borrowers do not pay instalments and these are sent out monthly;

(ii) That in addition, letters of demand are also sent out to request the borrower to remedy any default in the payment of the instalments;

(iii) That in this case he does not have the letters but the letters would have been sent out;

(iv) That such letters requesting the defendant to pay the arrears in the year 1998 was sent to the defendant in the year 1998;

(v) That para. 3 at p. 73 of bundle F in bold below, being a formal letter of demand from M/s Zain Megat & Murad claiming for the Principal, Interest, Late Payment Interest and Other Costs refers also to these letters of demand to the defendant in the year 1998.

[13] The relevant part of the said formal letter of demand dated 25 April 2003 reads:

> We have been further instructed that you have defaulted on the principal of the Mortgage Loan Facility and are now in arrears and owing our client the sum of RM540,300.99 inclusive of interest, late payment interest and other cost as at 1.4.2003 particulars of which are as follows:
>
> | Particulars | Amount |
> |---|---|
> | Principal | RM 282,600.00 |
> | Interest | RM 59,276.13 |
> | Late Payment Interest | RM 197,300.61 |
> | Other Cost | RM 1,124.25 |
> | TOTAL | RM 540,300,99 |
>
> *Despite our client's numerous requests for settlement of the above outstanding arrears you have failed and/or neglected to pay the said sum or any part thereof.* (emphasis added)

[14] The relevant event of default is set out simply in s. 11.01(a) of the Loan Agreement as follows:

> **Section 11.01 Events Of Default**
>
> The Borrower is deemed to have committed a default if the Borrower commits or threatens to commit a breach of any of the covenants, undertaking, stipulations, terms, conditions, or provisions, herein stipulated and without prejudice to the generality of the foregoing, upon the happening of any one or more of the following events:
>
> (a) **if the Borrower fails or defaults in the payment of any sum of money whatsoever** and howsoever payable on its due date by virtue of the provisions herein contained **whether formally demanded** or not; or
>
> (b) if the Borrower fails to comply with **any notice** given under the Security Documents requiring him to *remedy any breach of the terms of the Security Documents* within the time stipulated therefor; (emphasis added)

[15] The expression "security documents" refers to the loan agreement and the deed of assignment executed by the borrower as defined in s. 1.01 of the Loan Agreement.

[16] I agree with learned counsel for the defendant Mr MR Kumar that it is plain that a failure to pay an instalment which is due would fall under s. 11.01(a). Upon the happening of such a default, s. 11.02 of the loan agreement is activated and shall apply. Section 11.02 reads as follows:

> Section 11.02 Right Of Lender On Borrower's Default
>
> If the Borrower shall commit a default pursuant to the terms herein or **if any of the events stipulated in Section 11.01 hereof shall happen** and which **if capable of remedy is not remedied** within a period of seven (7) days from the date of notice by the Lender requesting remedy of the same, or is not remedied within the time specifically stipulated therefor (if any) in respect of the event in question, *the Loan, interest thereon and all other sums payable under this Agreement shall become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable* and whereupon the Lender shall be entitled without further notice to the Borrower to:
>
> (a) terminate the licence hereinbefore referred to and to enter upon and take possession of the Property or any part thereof and to-deal with all the rights and interest of the Lender in relation to the Property or otherwise in all respects as the person absolutely and beneficially entitled thereto; (emphasis added).

[17] In the light of the definitive deeming provision above and in the light of the admission of PW1 that numerous letters to remedy the default had been sent even in 1998, I agree with learned counsel Mr M R Kumar that the cause of action would have been triggered. Based on the proposition of law laid down in the Court of Appeal case of *WTK Holdings Bhd v. Foo Sae Heng & Anor* [2011] 5 CLJ 433 at p. 437:

> As a matter of general principle, when the defence of limitation is raised, the burden is upon the party relying upon the cause of action so impugned to prove it is brought within the period of limitation. See *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504, applied in *BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 CLJ 599 CA.

[18] The failure of the plaintiff to produce these letters of reminder and remedy of the breach in default of the arrears of instalments would give rise to the imposition of the presumption of adverse inference under s. 114(g) of the Evidence Act 1950.

Furthermore this is an apt case for the application of s. 106 of the Evidence Act 1950 where "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

[19] The loan which is the principal sum of RM282,600 and interest thereon have become forthwith due and payable under s. 11.02 of the Loan Agreement. Learned counsel for the plaintiff bank insisted that a formal notice to recall the whole loan must first be made in the light of s. 7.01 of the Loan Agreement before a cause of action to recover the loan can be said to have accrued. However s. 7.01 states the very opposite. It reads:

> Without prejudice to Section 11.02, the Loan so far as not otherwise repaid or discharged under the provisions of this Agreement shall be repaid by the Borrower on demand by the Lender ...

[20] Being preceded by and made without prejudice to s. 11.02, it means that a formal recall of the loan is not necessary to found a cause of action for recovery of the whole loan. This is further underscored by the expression "notwithstanding anything contained herein to the contrary" in s. 11.02 of the Loan Agreement as follows: "... **the Loan, interest thereon** and all other sums payable under this Agreement *shall become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable* ..." (emphasis added). Nothing could be clearer. Having cast the net so broadly as to give itself maximum leverage and latitude, the plaintiff bank cannot now backtrack and beg for indulgence when a cause of action had earlier and even easily accrued because of the use of automatic activated deeming default clause and a deeming debt due clause in ss. 11.01 and 11.02 respectively. What is sauce for the goose is sauce for the gander!

[21] This is not a case where after some letters of reminder to remedy breach there is payments to regularise the loan repayment. It is a case where from the very inception when the instalments are to be paid after a full disbursement of the loan, no single payment had been made.

[22] Even taking the end of 1998 as the accrual of the cause of action and taken a period of 12 years to sue as provided for under s. 21(1) of the Limitation Act 1953 for a recovery of a loan secured under an assignment, the end of 2010 would be the expiry of the limitation period. This second suit was filed only on 17 October 2011.

[23] Section 21(1) of the Limitation Act 1953 reads: A

> 21. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land.
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or B personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

[24] I had occasion to deal with this limitation period of 12 years C in a case of a loan secured by way of a charge and in this present case by way of an absolute assignment in *Malayan Banking Berhad v. Wembley Industries Holdings Bhd* [2012] 5 CLJ 956 as follows:

> [27] I agree with learned counsel for the plaintiff that since the D indebtedness of the defendant was at all material times secured by a charge over the assets, properties and undertaking of the defendant, the relevant period of limitation is 12 years under s. 21(1) of the Limitation Act 1953. Following s. 6(5)(b) of the said Act, the six years limitation period for actions founded on a contract is not applicable. E
>
> [28] No further authoritative pronouncement is necessary other than a reference to the Federal Court's case of *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd* [2005] 3 CLJ 825 where His Lordship Alauddin Mohd Sheriff FCJ (as he then was) set out the question for determination at p. 832 as follows: F
>
> > Question (1): Whether a claim for balance after sale is a claim founded on contract and therefore subject to the limitation period of six years under s. 6(1)(a) of the Limitation Act 1953 ('the Act') or a claim for money G secured by charge on land and thereafter subject to the limitation period of 12 years under s. 21(1) of the Act?
>
> [29] His Lordship continued at p. 834 as follows:
>
> > Having had a close look at both sections mentioned above, H we are of the view that s. 6 cannot apply in this case in view of the express exclusion of "any action to recover money secured by any mortgage of or charge on land" in s. 6(5)(b). The action is therefore not founded on a claim on contract under s. 6. I
> >
> > In our judgment, the applicable provision is s. 21. Section 21(1) specifically refers to an action to recover moneys secured by a charge which is an action *in personam*, whilst s. 21(2) specifically refers to a foreclosure action in respect

A of mortgaged personal property which is an action in rem. The limitation period is therefore twelve (12) years from the date when the right to receive the money accrued or twelve (12) years from the date on which the right to foreclose accrued respectively ...

B **[25]** See also a concurrent view expressed by His Lordship Mohamed Ariff J (as he then was) in *RHB Investment Bank Bhd & 5 Ors v. Plaza Rakyat Sdn Bhd & Anor* [2012] 5 AMR 363.

Whether The Realisation Of A Shortfall After The Auction Gives Rise
C *To A Fresh Cause Of Action*

[26] The plaintiff relied heavily on the Federal Court case of *Tan Kong Min v. Malaysia National Insurance Sdn Bhd* [2005] 3 CLJ 825 for the proposition that the cause of action against the
D chargor there as regards his personal liability will only accrue after the differential amount has been ascertained ie, after the land has been sold. The plaintiff submitted that the cause of action shall only accrue after the sale of the defendant's property had been conducted on 28 December 2009 and as such the second suit
E was filed within time. Clearly the above proposition of law was influenced by another proposition of law set out at p. 838 of the judgment as follows:

At the risk of repetition, we would reiterate that the personal liability of the appellant as chargor is in respect of the difference
F between the amount due under the housing loan and the amount realised from the sale of the said land only and the cause of action against the appellant is only complete upon the conclusion of the sale of the said land. Indeed, if a suit is brought against the chargor before the completion of the foreclosure action and the
G determination that there is a balance still owing, such a suit could be struck-off as being premature.

[27] The Federal Court in *Tan Kong Min*'s case was approving the said proposition based on the case of *Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah* [1991] 1 CLJ 821;
H [1991] 2 CLJ (Rep) 732 where His Lordship Lamin J (as he then was) answered the following question in the negative:

Whether the plaintiff being also the Chargee of ... (the said land) was entitled at law and in equity to proceed by way of a civil
I suit before first realizing the security under the charge and if so, whether the plaintiff was entitled to proceed concurrently on all its remedies.

[28] The Federal Court in a subsequent case in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 overruled *Wan Mohd Wan Ngah*'s case. In *Chan Boi Loi v. Public Bank Bhd & Another Application* [2009] 6 CLJ 81 at p. 91 the Federal Court remarked as follows:

> As for *Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd bin Wan Ngah*, it was clearly overtaken by the decision of this court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* and must now be regarded as overruled. It is of interest to note that Lamin PCA was a member of this court in *Low Lee Lian* and subscribed to a view that was at variance with that he had expressed in *Wan Mohd Wan Ngah*'s case.

[29] In as much as *Wan Mohd Wan Ngah*'s case *(supra)* has been overruled, the *raison d'etre* for holding that a fresh cause of action *in personam* for the shortfall only arises upon ascertaining the amount after a successful auction must be taken as have been impliedly overruled too. The Federal Court in *Chan Boi Loi*'s case *(supra)* went on to reiterate at p. 91 as follows:

> [8] We would reiterate that *a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary*. Such an agreement is not to be implied from a clause in an annexure to a charge in terms of cls. 8 and 16 in the present instance. *All that a clause in those terms does is to create a right in the lender to recover the balance outstanding in the event that a sale of the charged property produces a shortfall. It is not an agreement by the instant respondent bank to postpone its right to bring an action in personam for the recovery of the whole sum lent (together with interest) until after the charged land has been sold.* If the courts were to read such an agreement into the clauses in question it would amount to an unwarranted restriction on a lender's rights to seek the remedies open to it. The fallacy of the contrary argument is revealed by asking the question: what if the land can never be sold despite all attempts to do so? It would mean that the borrower would get away scot-free from making any payment because his answer to any action by the lender upon the covenant to pay would be that it is a condition precedent that the land be sold and a shortfall produced before any suit may be instituted. The want of logic in that proposition is sufficient to demonstrate that it is not common sense and certainly not the common law. (emphasis added)

[30] The case of *In Re McHenry McDermott v. Boyd* [1894] 8 Ch 290 is instructive. The facts are sufficiently summarised in the headnotes as follows:

> By a memorandum of deposit, dated in 1882, of bonds to secure the repayment in 1883 of an advance, the borrower authorized the lender to sell the bonds for the purpose of repaying the advance, and undertook to pay the lender any difference between the proceeds of the bonds and the amount of the advance. In 1889 the lender sold the bonds, but the proceeds were not sufficient to repay the whole of the advance. In 1891 the borrower died without having given any acknowledgment of the debt:
>
> Held, (reversing the decision of North, J), that the cause of action in respect of the whole of the debt accrued in 1883 and not in 1889, and therefore that a claim for the difference by the lender against the estate of the borrower was barred by the Statute of Limitations.

[31] The relevant second paragraph of the memorandum of deposit of shares read as follows:

> In the event of the loan remaining unpaid after it becomes due, I hereby authorize you to realize the securities as you may deem fit, for the purpose of repaying yourself the amount due to you, and I undertake to pay you any difference between the net proceeds of the securities and the amount due to you as well on account of the sum advanced as for interest thereon and all charges and expenses of realization.

[32] Lord Herschell LC in clear and crisp language observed as follows at pp. 293-294:

> But it is said that the claim is not barred by reason of the second paragraph of the document I have read; that, as the securities were not realized until September, 1889, until realization the actual amount due could not be ascertained, and that therefore the statute could only begin to run from the date of realization. This view found favour with the learned Judge in the Court below; but, with all deference, I am unable to agree with him. The second paragraph of the document was no doubt intended to give, and did give, Barker a power of sale over the bonds; and, a power of sale being so given, the creditor, if he exercised his power of sale, would be bound to set against the debt due to him *pro tanto* the amount realized by the securities; but, in determining the amount realized, the expenses of realization must be taken into

account, and only the net amount of the realization, after payment of those expenses, could be set against the debt. Now that claim could have been made by him quite independently of any express authority contained in the latter part of the agreement. If, as was properly admitted by the counsel for Mr. Barker, the latter part had been confined to the power of sale, the right of the creditor in law would have been precisely the same as if those words had not been inserted. *I cannot say that that right of realization gave a new, separate, and independent cause of action, so that the statute did not begin to run until from that date. The truth is that the debt is one debt only. The second clause of the document did not create a new debt, but only prescribed what should be done in the event of realization, and what use should be made of the money realized. The words gave the creditor no right which would not equally have existed without them*. The contention of the Respondent comes to this, that although the words of the document gave no new right, and only put into words what the creditor's legal rights would have been without any such words, yet because these words are used, they give an independent right, and the operation of the statute could be indefinitely postponed by a mere statement of the legal rights which the creditor would have had without any such statement, whereas, if they had not been used, the statute would have begun to run from the earlier date. That, in my opinion, is an impossible contention, and therefore the judgment of the Court below must be reversed. (emphasis added)

[33] Lindley LJ also concurred and carefully explained the position as follows at pp. 294-295:

Now comes the clause - the second paragraph - upon which Mr. Justice North thought there was a new contract. It appears to me that *that clause was not intended to alter the contract to pay, but to express the right of the creditor as to the mode of dealing with the securities. It gives him power to sell the securities, and directs him what to do with the proceeds, and says that the debtor will pay any deficiency. That does not affect the original promise or obligation to pay*. The clause is this: (His Lordship read it, and continued:) It means that, if the amount is not paid when it becomes payable, Barker may realize the securities, giving McHenry credit for the amount of the proceeds. *The promise to pay the deficiency does not create a new obligation to pay: it only applies the old obligation to a reduced sum. The realization of the security does not add to the cause of action; the cause of action accrued long before*. (emphasis added)

[34] I would thus readily agree with learned counsel Mr M R Kumar for the defendant that the right of realisation of the property does not vest in the plaintiff a new, separate and an independent cause of action. Clause 11.04 of the loan agreement reads:

> If the amount realised by the Lender pursuant to the proceedings referred to in Section 11.03 hereof after the deductions thereof is less than the amount due and payable to the Lender …, the Borrower shall pay to the Lender the difference between the amount due and the amount so realised and until payment will also pay interest on such balance at the Prescribed Rate herein.

[35] This clause bears a striking resemblance to the second paragraph of the memorandum of deposit of shares in the *In re McHenry*'s case. I agree with Mr M R Kumar that this clause does not create a new debt but only stipulates the obvious ie, that the defendant continues to be liable for any shortfall which may accrue post realisation of the said property. The cause of action having accrued in February 1998 and based on the limitation period of 12 years under s. 21 of the Limitation Act 1953, this second suit filed on 17 October 2011 is time-barred.

Whether The Plaintiff's Second Suit Herein Is An Abuse Of Process

[36] Mr M R Kumar submitted that this case is one where from day one the borrower as purchaser had decided not to take vacant position of the office lot. MBf Finance Bhd knew or ought to have known about this as consent to the deed of assignment of the office lot had been given by both the owner and the developer at pp. 68 and 69 of bundle F. As the said office lot had been absolutely assigned to MBf Finance Bhd, one would have expected the Project Manager of MBf Property Services Sdn Bhd who is the attorney of both the owner and the developer to have given notice of the handing of vacant possession and the collection of keys to MBf Finance Bhd as well. At any rate the Project Manager and the Financier belong to the same MBf Group of Companies.

[37] The first suit was struck out by the court for non-attendance of both parties. The plaintiff application to reinstate the first suit was dismissed on 10 January 2011. The plaintiff then appealed against the High Court decision to the Court of Appeal but on 19 May 2011 withdrew the said appeal with no reason given. Now the second suit has been filed. Learned counsel Mr M R Kumar submitted that such an action of the plaintiff falls

within the meaning of abuse of process or what is commonly referred to as "the extended doctrine of *res judicata*". Its root is traceable to the *dicta* of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

[38] The distinction between *res judicata* (cause of action estoppel and issue estoppel) on the one hand and abuse of process on the other received judicial elucidation in *Bradford & Bingley Building Society v. Seddon* [1999] 1 WLR 1482 where Auld LJ said at pp. 1490 to 1491 as follows:

> In my judgment, it is important to distinguish clearly between *res judicata* and **abuse of process** not qualifying as *res judicata*, ... The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in "special cases" or "special circumstances:" see *Thoday v. Thoday* [1964] p. 181, 197-198, per Diplock LJ and *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, *the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter* ...
>
> Thus, abuse of process may arise where there has been no earlier decision capable of amounting to *res judicata* (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. *It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue* ... (emphasis added)

[39] The above principle of abuse of process has been applied in the Singapore case of *Setiadi Hendrawan v. OCBC Securities Pte Ltd and others* [2001] 3 SLR (R) 296 and the case of *Goh Nellie v. Goh Lian Teck and others* [2007] 1 SLR(R) 453. Our very own Court of Appeal also had occasion to apply this principle of abuse

of process in the case of *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2011] 9 CLJ 873 at pp. 888-889 where His Lordship Ramly Ali JCA observed as follows:

> [32] In addition to issue estoppel, the respondents are also entitled to rely on the wider principle of abuse of process or the extended doctrine of *res judicata*. Abuse of process may arise where there is no cause of action estoppel or there is no issue estoppel. It is not subject to the same test as in cause of action estoppel or issue estoppel. The task of the court in dealing with the issue of abuse of process is to draw a balance between the competing claims of one party and the right of the other not to be unjustly hounded given the earlier history of the matter. (See *Bradford & Bingley Building Society v. Seddon* [1999] 1 WLR 1482.) On this issue Lord Halsbury LC in *Reichel v. Magrath* [1889] LR 14 App Cas 665 at 668 had once stated:
>
> > I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.
>
> [33] The decision of the House of Lords in *Hunter*'s case *(supra)* illustrates clearly the distinct features of the doctrine of abuse of process. The appellant in that case was one of the accused in a criminal trial. He and his other co-accused alleged that their confessions had been induced by police violence. The trial judge ruled that their confessions were voluntary and they were accordingly convicted. The appellant then brought a civil claim against the police for damages for assault based on the alleged violence inflicted in the course of extracting his confession. The House of Lords unanimously held that the claim should be struck out as an abuse of process because it was in fact an attempt to re-litigate an issue that had already been decided. It was in essence a collateral attack, mounted by means of a civil action, against the decision of the criminal court on the same point.
>
> [34] The doctrine of abuse of process applies to cases which fall outside the traditional reach of cause of action estoppel and issue estoppel but which have nonetheless been barred from proceeding. The doctrine has been recognised as a part of the law in England. (See *Johnson v. Gore Wood & Co (a firm)* [2002] 2 AC 1 and *McllKenny v. Chief Constable of West Midlands (supra)*.

[40] It is important for the court to look into the history of the case and the overall justice of the matter. Here the first suit was commenced in February 2004. It was struck out in April 2010. The plaintiff's application to reinstate the suit was dismissed in

January 2011. The appeal to the Court of Appeal was withdrawn in May 2011. The current second suit was recommenced in October 2011. The only difference in the claim is the additional element of the proceeds from a successful auction on 28 December 2009 of RM184,000. One would have expected the claim to be less having taken into consideration the proceeds from the auction. However it is now a whopping RM1,123,473.47 as at 14 July 2011 as compared to the sum of RM563,569.37 as at 1 September 2003.

[41] Here is a case where even though the default took place from the very inception in 1998, the auction was not proceeded with until the first auction on 10 February 2009; some 11 years later. There was no explanation given as to the delay. The sluggish inaction of the bank had caused no small suffering to the borrower with escalating default and penalty interest of 10.50% per annum. The tardiness of the bank had visited this trouble and torment on the borrower. The inordinate delay on the part of the bank is inexcusable and most inimical to the interest of the borrower. There are many things the bank could do such as under s. 11.02(b) to:

> let or lease the Property or any part thereof for such tenancy or term of years at such rent and upon such terms and conditions as the Lender shall in its absolute discretion think fit.

[42] Indeed there is evidence that there was a Lease Agreement dated 28 August 1996, a day after the Sale and Purchase Agreement was dated, for the office lot to be let out to Uncang Emas Sdn Bhd as Tenant. See letter of MBf Property Services Sdn Bhd dated 25 March 1998 to the defendant at p. 187 of bundle F. It was a lease with some guaranteed return on rental. MBf Property Services Sdn Bhd in that latter had stated that the tenancy commences seven days from the date of the letter. There was a credit note dated 19 October 1996 from MBf Property Services Sdn Bhd as the attorney for Uncang Emas Sdn Bhd at p. 180 of bundle F giving a credit note of RM178,428 to the defendant. That was how the differential sum was said to have been paid by the defendant to the developer. A closer scrutiny disclosed that out of that sum, a sum of RM141,321 is derived from the guaranteed net annual return. If that be the case surely this sum should be paid over to MBf Finance Bhd as all the rights, title and interest of the defendant had been absolutely assigned to it.

[43] At any rate, it is unfair, inequitable and unconscionable for the plaintiff, taking all the circumstances of the case into consideration to now mount a second suit. In *MBf Finance Bhd v. Muruges Kuppusamy* [2012] 9 CLJ 1045, His Lordship VT Singham disallowed the plaintiff's claim on interest from the period between the notice of demand and the auction of some five years delay. His Lordship observed at pp. 160 to 162 as follows:

> [16] The merger of the plaintiff bank was made on May 21, 2002 by the order of the High Court dated May 21, 2002 in Originating Summons No. D8-24-111-2002. Surely, the merger of the plaintiff bank and the delay that will be caused as a result of the merger was not foreseeable at the time of the execution of the loan agreement that the defendant would also be liable to pay the additional interest and late payment interest during the period of the indefinite delay caused by the plaintiff in proceeding with the auction *which may arguably have fetched a true or fair market value of the property if the public auction had proceeded much earlier or within a reasonable time from the expiry of the date stipulated in the notice of demand* dated November 15, 2001. (See *Mc Hugh v. Union Bank of Canada* [1913] AC 299, *Cuckmere Brick Co Ltd Another Mutual Finance Ltd* [1971] Ch 949 at 966, 967, *Standard Chartered Bank v. Walker* [1982] 3 All ER 938 at 942). Accordingly, the reason for the delay in proceeding with the auction was beyond the contemplation of the parties at the time of the execution of the loan agreement on October 10, 1996. Therefore, *the defendant ought not to be punished or penalised or burden for the interest and the late payment interest during the said period of the delay which was caused by the plaintiff and the defendant has nothing whatsoever to do with the internal affairs of the plaintiff.*
>
> [17] It is important to note that at the time when the Summons No. 9 52-2175-2002 was filed at the Sessions Court on February 21, 2002, the claim was for only RM227,135.63. However, the claim was reamended to RM496,650.32 on the application of the plaintiff by the Sessions Court on November 12, 2010 which had included the accrued interest on the monthly rest and the late payment interest during the period of the said delay. The proceeds obtained from the sale through the public auction on August 20, 2007, being RM78,000 to settle the outstanding amount due was insufficient and pursuant to clause 11.04 of the loan agreement, the plaintiff was entitled to claim the difference between the amount due and the amount so realised from the proceeds of the sale of the property. *This court finds, there is certainly a prolong delay on the plaintiff's part in proceeding with the auction and there is no doubt that the delay had caused prejudice, injustice and unreasonable burden to the defendant due to the accumulated interest and late payment*

interest which the plaintiff has claimed as penalty interest in respect of the late payment interest. The defendant, therefore, must be compensated adequately by deducting the interest and the late payment interest and the chargers for the said period which is about five years.

[18] Inordinate and contumelious delay and ordinary delay on the part of the plaintiff must be distinguished. Ordinary delay to recover proceeds obtained in a judicial sale arising out of a foreclosure proceeding may arguably be acceptable as being part of the legal process provided the plaintiff had proceeded with the auction timeously and expeditiously as the remedy was available to the plaintiff as early as 2001. In fact, when the defendant had failed to repay the sum demanded with the interest within the prescribed period as contained in the notice of demand dated January 19, 2001 and November 15, 2001, the defendant shall be deemed to have committed breach under the terms of the loan agreement and the plaintiff ought to have proceeded to enforce the security and proceeded with the auction without any unreasonable delay. (See clause 10 of the loan agreement dated October 10, 1996.) On the other hand, in some cases, as stated above, the completion of the process of an auction is delayed particularly, when the auction is aborted due to having no bidders and under those circumstances, the plaintiff should not be held responsible for the delay. In the present case, the auction was aborted on November 27, 2006, January 15, 2007, February 12, 2007, May 7, 2007, June 11, 2007 and July 23, 2007 when the auction was finally completed and the property sold on August 20, 2007. However, as *in the present case, where there is an inordinate delay on the part of the plaintiff and the reasons advanced on the plaintiff's behalf is certainly not acceptable which had resulted in prejudice and unfairness to the defendant.* The delay and the reasons for the delay was not foreseeable and outside the contemplation of the parties in particular, the defendant, at the time when the loan agreement was executed. (emphasis added)

[44] The duty of care of the lender to dispose of the security put up for a loan at the best possible price has been highlighted in *Cuckmere Brick Co Ltd and Another v. Mutual Finance Ltd* [1971] 1 Ch 949. The Court of Appeal there held that the mortgagee owes a duty to the mortgagor to obtain the best price in the event of possession and subsequent realisation. Lord Justice Salmond stated the following view when deliberating on the applicable law in the area mortgagee's duty towards the mortgagor at p. 966:

There are some *dicta* which suggest that unless a mortgagee act in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other *dicta* which suggest that in

A addition to the duty of acting in good faith the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he choose to sell it ...

B The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law.

[45] Further at p. 967 Lord Justice Salmon citing the case of *McHugh v. Union Bank of Canada* [1913] AC 299 opined as follows:

C It is a well settled law that it is the duty of the mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property so that the mortgagor may receive credit for the fair value of the property sold.

D **[46]** Lord Denning MR in *Standard Chartered Bank Ltd v. Walker and another* [1982] 1 WLR 1410 at pp. 1415 to 1416 expressed with characteristic clarity the duty of care of the lender as follows:

E We have had much discussion on the law. So far as mortgages are concerned the law is set out in *Cuckmere Brick Co Ltd v. Mutual Finance Ltd* [1971] Ch 949. If a mortgagee enters into possession and realises a mortgaged property, it is his duty to use reasonable care to obtain the best possible price which the F circumstances of the case permit. He owes this duty not only to himself, to clear off as much of the debt as he can, but also to the mortgagor so as to reduce the balance owing as much as possible, and also to the guarantor so that he is made liable for as little as possible on the guarantee. This duty is only a particular application of the general duty of care to your neighbour which G was stated by Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562 and applied in many cases since: see *Dorset Yacht Co. Ltd. v. Home office* [1970] AC 1004 and *Anns v. Merton London Borough Council* [1978] AC 728. The mortgagor and the guarantor are clearly in very close "proximity" to those who conduct the sale. H The duty of care is owing to them – if not to the general body of creditors of the mortgagor. *There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing the time, he must exercise a reasonable degree of care.*

I So far as the receiver is concerned, the law is well stated by Rigby LJ in *Gaskell v. Gosling* [1896] 1 QB 669, a dissenting judgment which was approved by the House of Lords [1897] AC 575. The receiver is the agent of the company, not of the

debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the company, of which he is the agent, to clear off as much of its indebtedness to the bank as possible, but he also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor. It may be that the receiver can choose the time of sale within a considerable margin, but he should, I think, exercise a reasonable degree of care about it. The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realisation. If it does so, then it too is under a duty to use reasonable care towards the company and the guarantor.

If it should appear that the mortgagee or the receiver have not used reasonable care to realise the assets to the best advantage, then the mortgagor, the company, and the guarantor are entitled in equity to an allowance. They should be given credit for the amount which the sale should have realised if reasonable care had been used. Their indebtedness is to be reduced accordingly. (emphasis added)

[47] Arguably, had the property been auctioned soon after the default the price could have been better. At any rate the borrower would not be confronted with a debt of over RM1.1 million for a loan of RM282,600 for a purchase price of RM471,070 which could only be sold for RM184,000 in December 2009!

[48] In the circumstances of the case and for the reasons given above and having particular regard to the undue and inordinate delay on the part of the bank to realise the security by way of an auction sale and having commenced this second suit after 12 years from the default in February 1998 and in allowing the debt to balloon to more than RM1.1 million, I had held that this second suit was an abuse of process.

Pronouncement

[49] Both on the ground that the claim is barred by limitation and that this second suit is an abuse of process, I was constrained to dismiss the plaintiff's claim with costs of RM20,000.